Supreme Court, U.S.
FILED

981472 DEC 30 1998

OFFICE OF THE CLERK

NO. _____

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1998

George G. Green,
Petitioner

v.

Allied Interests, Inc.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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Attorney for Petitioner,
George G. Green

36pp

## ISSUES PRESENTED

Whether the state trial court should have proceeded to hear requests for criminal contempt fines even though Petitioner had not been served personally with notice of the charges and had not otherwise received actual notice of the hearing?

Whether the state trial court should have proceeded to hear requests for criminal contempt fines even though Petitioner was not present at the hearing and did not waive his right to be present?

Whether the state intermediate appellate court should have refused to provide appellate review of criminal contempt fines or address Petitioner's constitutional arguments on the grounds that the fines were "de minimus"?

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## LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Supreme Court of Texas insofar as review of its judgment is sought.

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## DECISIONS BELOW

The decision of the Supreme Court of Texas is not reported. It is reproduced in the Appendix A. The opinion of the intermediate court of appeals is not reported; but it is also reproduced in Appendix A. The trial court's order and final judgment of which Petitioner complains are reproduced in Appendix B.

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## STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Texas (App. A, infra p. A-9) was rendered on July 16, 1998. A motion for rehearing was denied on October 1, 1998 (App. A, infra p. A-10). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

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## STATEMENT OF THE CASE

Petitioner suffered an adverse judgment following a state court jury trial. He objected but did not otherwise respond to Respondent's post-judgment discovery. After Petitioner's counsel of record withdrew in the case, Respondent requested the imposition of punitive and coercive contempt fines against Petitioner. Without requiring personal service on Petitioner or his presence for the contempt hearing, the trial court ordered Petitioner to pay to Respondent $10,000 for "disobeyance of previous orders of this Court and for his willful obstruction of post-judgment discovery." The trial court also ordered Petitioner to pay Respondent's attorney fees and $2,000 for every day that Petitioner did not provide either type of post-judgment discovery Respondent sought.

After the rendition of a final judgment incorporating the $10,000 penalty ("the $10,000 fine") and $4,000 of the per diem penalties ("the $4,000 fine"), Petitioner appealed to the state intermediate appellate court. That court rejected Petitioner's argument that the trial court had denied him procedural due process. The state intermediate appellate court also failed to conduct an appellate review of the $4,000 fine.

Petitioner complained to the Supreme Court of Texas, arguing (among other things) that the trial court had improperly imposed contempt fines without the procedural safeguards required by due process; and that the intermediate appellate court had arbitrarily denied Petitioner his right to appellate review of those fines. The Supreme Court of Texas declined to review the intermediate appellate court's judgment. Petitioner's motion for rehearing was denied.

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## SUMMARY OF THE ARGUMENT

Petitioner's case meets the test of *United Mine Workers v. Bagwell*, 512 U.S. 821, 129 L.Ed.2d 642, 114 S.Ct. 2552 (1994) for determining whether contempt fines levied against him were criminal fines. The $10,000 fine was explicitly criminal because the trial court imposed it for "disobeyance of previous orders of this Court and for [Petitioner's] willful obstruction of post-judgment discovery." The $4,000 fine was implicitly criminal because it was not compensatory (the trial court separately ordered Petitioner to pay Respondent's attorney fees), and it was ultimately imposed as a 'flat, unconditional' fine. The trial court's final judgment did not offer Petitioner any opportunity to reduce or avoid the fines through compliance.

Because the court imposed criminal fines, Petitioner was entitled to process the Constitution requires for criminal proceedings. The court failed to provide required process in two ways expressly argued to the state appellate courts: 1) The court did not require personal service of the contempt charges upon Petitioner, who had no actual notice; and 2) The court did not require Petitioner's presence at trial or an affirmative waiver of his right to be present.

The intermediate appellate court ruled that the $4,000 fine was "de minimus" and, therefore, "presented [nothing] for our review." The Supreme Court of Texas declined to review the intermediate court's judgment. Both courts thereby denied appellate review of penalties contrary to this Court's decision in *Honda Motor Company, Ltd. v. Oberg*, 512 U.S. 415, 129 L.Ed.2d 336, 114 S.Ct. 2331 (1994). This denial of appellate review makes the state supreme court's judgment constitutionally infirm even if the $4,000 fine was a 'petty' contempt fine that might not trigger all Sixth Amendment protections. *Muniz v. Hoffman*, 422 U.S. 454, 45 L.Ed.2d 319, 95 S.Ct. 2178 (1975) (no right to jury trial). Also, the Constitution required personal service on Petitioner and his presence at the contempt hearing regardless of whether the $4,000 fine was 'serious'.

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## ARGUMENT

**The state courts violated the Constitution by imposing criminal contempt fines on Petitioner, who was not present at the contempt hearing and was not personally served with notice of the charges, and also by failing to provide appellate review of the criminal contempt fines.**

"Criminal contempt is a crime in the ordinary sense," *Bloom v. Illinois*, 391 U.S. 194, 201, 20 L.Ed.2d 522, 88 S.Ct. 1477 (1968), and "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Hicks v. Feiock*, 485 U.S. 624, 632, 99 L.Ed.2d 721, 108 S.Ct. 1423 (1988). In *United Mine Workers v. Bagwell*, 512 U.S. 821, 129 L.Ed.2d 642, 114 S.Ct. 2552 (1994), this Court made clear that such constitutional protections are required in the "fine context" as long as the contempt fines are criminal.

### A. *United Mine Workers* test met.

In *United Mine Workers v. Bagwell*, *supra*, the Court addressed a practice, developed in apparent reliance upon a previous *United Mine Workers* case (*United States v. United Mine Workers of America*, 330 U.S. 258, 91 L.Ed. 884, 67 S.Ct. 677 (1947)), "to authorize a relatively unlimited judicial power to impose noncompensatory civil contempt fines." *United Mine Workers v. Bagwell*, 512 U.S. at 830. Petitioner submits that this practice continues unabated in Texas state courts where, as in this case, without any of the procedural safeguards required for criminal proceedings, trial courts are "sanctioning" parties by levying criminal contempt fines against them.

The contempt fines in this case meet the *United Mine Workers v. Bagwell* test for determining whether a fine is criminal. The $10,000 fine was clearly "determinate and unconditional" and, therefore, "solely and exclusively punitive." *Hicks*, *supra*, 485 U.S. at 632-633. In fact, the trial court expressly stated that it was imposed for "disobeyance of previous orders of this Court and for [Petitioner's] willful obstruction

of post-judgment discovery." Further, this fine was not compensatory (the trial court separately ordered Petitioner to pay Respondent's attorney fees), and the court incorporated this fine in a final judgment without giving Petitioner an "opportunity to purge" the fine. Therefore, the $10,000 fine was conclusively criminal. *Penfield Co. v. SEC*, 330 U.S. 585, 590, 91 L.Ed. 1117, 67 S.Ct. 918 (1947).

The $4,000 fine, though not as clearly criminal as the $10,000 fine, was also criminal. Originally, the trial court levied this type of fine as a "per diem fine" that this Court has characterized as a "close analogy to coercive imprisonment." *United Mine Workers v. Bagwell*, 512 U.S. at 829. But the trial court then incorporated the $4,000 fine as a "flat, unconditional fine" without giving Petitioner an opportunity to reduce or avoid the fine through compliance. App. B, p. B-2. Petitioner submits that this made the $4,000 fine criminal in nature. *Penfield Co. v. SEC*, 330 U.S. at 588.

In fact, because the trial court's final judgment levied the $4,000 fine in "final, definitive amounts," the intermediate appellate court held that the judgment of which Petitioner complains "does not include a per diem sanction." App. A, p. A-4. The appellate court gave this as one justification for declining to provide appellate review of the $4,000 fine. *Id.* In this way, both the trial court and the appellate court eviscerated any "analogy" between the $4,000 fine and "coercive imprisonment." As levied in the judgment Petitioner assails, the $4,000 fine is final, punitive, noncompensatory and, therefore, criminal.

**B. Attendance at trial was required.**

The right to be present at trial and confront witnesses is fundamental to the type of trial the Sixth Amendment requires in a criminal case. *Pointer v. Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). It is undisputed that Petitioner (who was not represented by counsel at the time) was not present when the criminal fines were imposed; the trial court's order recites that fact. App. B, p. B-4. (The final judgment recites the fact that Petitioner attended the judgment hearing only "through counsel." App. B, p. B-1) The record

contains no finding that Petitioner waived his Sixth Amendment right to be present at trial and confront all witnesses; and no such waiver occurred.

**C. Personal service was required.**

The Constitution requires proper notice of the charges before criminal contempt fines may be levied. *Cooke v. United States*, 267 U.S. 517, 537, 69 L.Ed. 767, 45 S.Ct. 390 (1925). In this case, Petitioner was not personally served with notice of the contempt hearing or of the charges to be heard in that hearing. Instead, both the "motion for sanctions" prompting the hearing and the court's order granting the motion allege that Petitioner had been provided "reasonable notice" (App. B, p. B-8, ¶ z) by certified mail to: 1) Petitioner's "last known address," 2) his "forwarding address" provided by the U.S. Post Office, and 3) to an attorney (App. B, p. B-8, ¶ x) who was not Petitioner's counsel of record at the time. App. B, p. B-7, ¶ u.

Petitioner has not found any case in which this Court has held such service to be sufficient in a criminal proceeding; and authority from other courts indicates that such service does not comport with the requirements of due process. *See Ex Parte Herring*, 438 S.W.2d 801 (Tex. 1969) (service on contemnor's attorney by registered mail did not comport with due process). The record before the state appellate courts reflected that Petitioner did not get notice of the contempt proceedings until 10 days *after* the order levying criminal fines was signed.

**C. The fines were serious.**

Because the intermediate appellate court characterized the $4,000 fine as "de minimus" (App. A, p. A-5), Petitioner here addresses the issue of whether the fines levied below are serious enough to warrant this Court's review. As of the *United Mine Workers v. Bagwell* decision, *supra*, the Court left open the question "where the line between petty and serious contempt fines should be drawn." 812 U.S. at 837, n. 5. The Court's characterization of the *United Mine Workers*

*v. Bagwell* fines as "unquestionably...serious," *Id.*, was a factor in the Court's conclusion that those fines were criminal.

Petitioner submits the fines levied against him were serious for several reasons. First, those fines included a $10,000 fine as well as the $4,000 fine. Second, Petitioner is an individual not a union such as that involved in *United Mine Workers*. Third, discriminating among individuals on the basis of their financial resources (the trial court's order alleges that Petitioner "is a beneficiary under annuities...of in excess of $4,000,000.00" payable in January 1999. App. B, p. B-9, ¶ ff) would be arbitrary and invidious. Finally, the trial court's order alleges that Petitioner had displayed "a wanton disregard for the judicial process." App. B, p. B-8, ¶ aa. The only reasonable construction of the court's order is that it imposes serious fines for the serious misconduct alleged.

**D. Appellate review was required.**

Due process requires appellate review of punitive damages in a civil case. *Honda Motor Company, Ltd., v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). Given that the Constitution generally requires greater procedural safeguards in criminal proceedings than in civil proceedings, the *Oberg* analysis should be even more compelling in a criminal than in a civil proceeding. Moreover, even if the Court determines that the $4,000 fine in this case was civil instead of criminal, or that it was petty instead of serious, the *Oberg* case establishes that the Constitution requires appellate review of that fine.

The state appellate courts did not provide such review. The intermediate appellate court, whose judgment the Supreme Court of Texas declined to review, held that appellate review was not required for the $4,000 fine because of its opinion that such a fine was "de minimus" and, therefore, "nothing is presented for our review." App. A, p. A-5.

This was an incorrect conclusion as a matter of U.S. constitutional law. What was clearly presented for review was Petitioner's claim that

he had been fined in a contempt proceeding without personal notice of the proceeding and without being personally present in the proceeding. Such a "violation of constitutional rights is never *de minimus*, a phrase meaning so small or trifling that the law takes no account of it." *Lewis v. Woods*, 848 F.2d 649, 651 (5th. Cir. 1988).

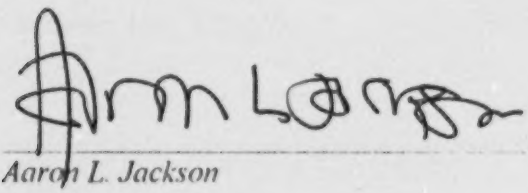
Appellate review was required, especially given Petitioner's claim that the trial court had violated his constitutional right to be personally notified of the contempt proceeding and to be personally present during the proceeding. By denying appellate review of Petitioner's constitutional claims, on the grounds that they considered the fine involved to be "de minimus," the intermediate appellate court attempted to block certain judicial territory from the reach of the U.S. Constitution. The Supreme Court of Texas has refused to correct this dangerous precedent. Petitioner seeks this Court's aid in vindicating his constitutional rights to notice, meaningful trial and appeal. These rights are the *sina qua non* of our judicial system.

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## *CONCLUSION*

*Petitioner respectfully prays that a writ of certiorari issue to review the Judgment of the Supreme Court of Texas.*

*Respectfully submitted.*



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*George G. Green*

*APPENDIX A*

NO. 03-97-00510-CV

George C. Green, Appellant

v.

Allied Interests, Inc., Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 250TH JUDICIAL DISTRICT, NO. 96-02545, HONORABLE JOSEPH H. HART, JUDGE PRESIDING

Appellant George C. Green ("Green") challenges a judgment by the court sanctioning Green for failure to obey court orders compelling post-judgment discovery. In two points of error, Green challenges the type of sanctions ordered by the court and the sufficiency of the court's findings supporting the sanction order. We will affirm.

**BACKGROUND**

Green obtained a multi-million dollar judgment in a whistleblower lawsuit against the State of Texas. *See Texas Dep't of Human Servs. v. Green*, 855 S.W.2d 136 (Tex. App. -- Austin 1993, writ denied).

Green hired appellee Allied Interests, Inc., to assist him in collecting that judgment. When Green then refused to pay Allied's bill for services rendered during the successful collection effort. Allied sued Green for breach of contract and fraud. After a trial on the merits, the trial court rendered a judgment, pursuant to the jury findings, against Green in the amount of $626,843.53. Green appealed that judgment in a separate appeal to this Court, and we affirmed. *See Green v. Allied Interests, Inc.*, No. 3-97-198-CV, slip op. at __ (Tex. App. -- Austin ____ 1998, ____).

Following the denial of Green's motion for a new trial, Allied sought post-judgment discovery pursuant to Texas Rule of Civil Procedure 621a from Green, who had not posted a supersedeas bond.[1] Allied properly served Green with discovery requests and a deposition

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[1] Texas Rules of Civil Procedure 621a states:

> At any time after rendition of the judgment, and so long as said judgment has not been suspended by a supersedeas bond or by order of a proper court and has not become dormant as provided by Article 3773, V.A.T.S., the successful party may, for the purpose of obtaining information to aid in the enforcement of such judgment, initiate and maintain in the trial court in the same suit in which said judgment was rendered any discovery proceeding authorized by these rules for pre-trial matters.

notice with subpoena duces tecum for the deposition of Green. Green ignored the discovery requests and failed to appear for his deposition. In response, Allied filed a motion to compel discovery and a motion to compel Green's attendance at a deposition. A hearing was set for April 14, 1997. After Green failed to appear at this hearing, the court granted Allied's motions to compel and ordered Green to pay $2,000 in attorneys' fees.

When Green refused to respond to the court's order, Allied filed another motion to compel discovery, as well as another motion for sanctions. A hearing was set for July 11, 1997. Green again failed to appear. In response to Green's failure to appear, Travis County District Judge Joe Hart rendered an order sanctioning Green $6,000 in attorney's fees; $10,000 for failure to obey court orders; plus per diem charges of $1,000 each day Green failed to respond to discovery requests and $1,000 for each day Green failed to appear for his deposition. As discussed below, the court made several findings of fact in support of this order.

Despite this order, Green still refused to answer discovery requests or appear for his deposition. On July 24, 1997, Green filed a

supersedeas bond to stay Allied's post-judgment discovery efforts. On November 12, 1997, Travis County District Judge John Dietz rendered a final judgment regarding sanctions, ordering Green to pay sanctions in the total amount of $14,312.33 (hereinafter the "Final Judgment"). The Final Judgment on sanctions incorporated Judge Hart's earlier order. Green appeals the monetary sanctions, challenging both Judge Hart's order awarding per diem sanctions and the sufficiency of the court's findings in granting the sanctions.

## DISCUSSION

In his first point of error, Green argues that Judge Hart lacked authority to grant per diem sanctions. Given the Final Judgment, however, this point is moot, and we need not address the propriety of awarding per diem sanctions. The Final Judgment rendered November 12, 1997, incorporated and superseded the July 11th order granting the per diem sanctions. This judgment awarded sanctions measured in final, definitive amounts. Specifically, the Final Judgment contained sanctions in the amount of $3,000 for Green's failure to respond to Allied's discovery requests and $1,000 for Green's failure to appear for

his oral deposition. These sanctions, which were based upon Green's refusal to obey court orders and his failure to comply with post-judgment discovery for more than six months, are de minimis. Therefore, because the Final Judgment does not include a per diem sanction, nothing is presented for our review. Green's final point of error is overruled.

In his second point of error, Green argues that the trial court erred in granting sanctions for post-judgment discovery because it did not make the necessary findings that such discovery was necessary to Allied's collection effort. In support of this argument, Green cites *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991).

Green, however, misinterprets TransAmerican. In *TransAmerican*, the Texas Supreme Court stated that while it is "helpful for appellate review of sanctions" to have findings, and "we recommend this practice in our trial courts," such findings are not mandatory. *Id.* at 919 n. 9 (trial court is not required to make findings before imposing discovery sanctions).

Judge Hart, however, followed this recommended practice and made numerous findings in the sanctions order in order to aid this court's review of the sanctions. These findings were incorporated into the Final Judgment. The trial court found that: (1) Allied was entitled to post-judgment discovery because it had received a judgment in its favor against Green; (2) all post-judgment motions had been denied; (3) no supersedeas bond was filed; (4) Allied had properly served Green its discovery requests; (5) despite being aware of these discovery requests, Green refused to comply, even after he was ordered to do so by the court on April 14, 1997;[2] (6) Green received reasonable and sufficient notice of the court hearings on Allied's motions to compel discovery and sanctions; (7) Green received reasonable and sufficient notice of his obligations under the discovery orders, and (8) sanctions were necessary to obtain compliance as well as reasonable in light of Green's wanton disregard of the judicial process. The court then determined that it had the power to assess these fines under Rules 215 and 521a of the Texas

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[2] This was evidenced by Green's counsel's motion to withdraw in which counsel stated that Green was aware of Allied's deposition notice and discovery requests.

Rules of Civil Procedure, and that these sanctions would not have the effect of limiting Green's access to the court system.[3] These findings are more than sufficient to support the assessment of sanctions.

Regarding Green's argument that the post-judgment discovery was unnecessary for Allied to collect its judgment, the court specifically overruled all objections to the discovery requests in the July 11th order. The court was not required to make a special finding that the discovery was necessary. Green's second point of error is overruled.

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[3] Texas Rules of Civil Procedure 215(2)(b) states:

> *Sanctions by Court in Which Action is Pending.* If a party . . . fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167(a), the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just . . .

## CONCLUSION

Having overruled both of Green's points of error, we affirm the trial court's judgment.

_____

Mack Kidd, Justice

Before Justices Powers, Kidd and B.A. Smith

Affirmed

Filed: March 12, 1998

Do Not Publish

THE SUPREME COURT OF TEXAS
[SEAL] Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

July 16, 1998

Mr. Aaron L. Jackson
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Mr. R. Kemp Kasling
Drenner & Stuart
301 Congress Avenue, Suite 2100
Austin, TX 78701

RE: Case Number 98-0482
Court of Appeals Number: 03-97-00510-CV
Trial Court Number: 96-02545

Style: GEORGE G. GREEN v. ALLIED INTERESTS, INC.

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review, as redrafted, in the above styled case.

Sincerely,

John T. Adams, Clerk
by /s/
Courtland Crocker
Deputy

cc: Ms. Diane O'Neal, Clerk
Ms. Amalia Rodriguez-Mendoza

THE SUPREME COURT OF TEXAS
[SEAL] Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

October 1, 1998

Mr. Aaron L. Jackson
Jackson & Hemer
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Austin, TX 78701

Mr. R. Kemp Kasling
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Austin, TX 78701

RE: Case Number 98-0482
Court of Appeals Number: 03-97-00510-CV
Trial Court Number: 96-02545

Style: GEORGE G. GREEN v. ALLIED INTERESTS, INC.

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing in the above styled case.

Sincerely,

John T. Adams, Clerk
by /s/
Michael H. Kopp, Deputy

cc: Ms. Diane O'Neal, Clerk
Ms. Amalia Rodriguez-Mendoza

**APPENDIX B**

NO. 96-02545

| | | |
|---|---|---|
| ALLIED INTERESTS, INC., | § | IN THE DISTRICT |
| Plaintiff, | § | COURT |
| | § | |
| V. | § | TRAVISCOUNTY,TEXAS |
| | § | |
| GEORGE G. GREEN and | § | |
| GREEN CAPITAL CORP., | § | |
| Defendants. | § | 250TH JUDICIAL |
| | § | DISTRICT |

**FINAL JUDGMENT REGARDING POSTJUDGMENT SANCTIONS**

On this 12th day of November, 1997, came to be heard the request by the parties herein to render judgment based upon this Court's previous Order Granting Plaintiff's Third Motion to Compel and for Sanctions dated July 11, 1997 (the "Order"). The parties attended by and through their attorneys of record and announced ready for the hearing. The Court, after hearing and considering the evidence and the arguments of counsel, is of the opinion that a Final Judgment Regarding Postjudgment Sanctions should be entered against Defendant George G. Green.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that a Final Judgment Regarding Postjudgment Sanctions be entered in favor of Plaintiff Allied Interests, Inc. and against Defendant George G. Green. Plaintiff shall have and recover of and from Defendant George G. Green the sum of $14,312.33 (Fourteen Thousand Three Hundred Twelve and 33/100 Dollars), which sum represents the sanctions of $10,000.00 as ordered by Judge Joseph Hart in the Order plus $312.33 as interest thereof from July 21, 1997 through November 12, 1997, the added sum of $3,000.00 for the failure of George G. Green to provide answers to interrogatories and produce documents as ordered in the Order, and the added sum of $1000.00 for the failure of George G. Green to appear for this deposition as ordered in the Order.

It is intended that this Final Judgment Regarding Postjudgment Sanctions be a final judgment regarding the Order for the purposes of appeal. The Order is attached hereto as Exhibit "A" and is incorporated herein for all purposes. All writs and process may issue to enforce this judgment. This judgment shall bear interest at a rate of 10% per annum until paid.

SIGNED this 12th day of November, 1997.

/S/ John K. Dietz
JUDGE PRESIDING

APPROVED AS TO FORM:

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ATTORNEYS FOR DEFENDANTS

NO. 96-02545

| | | |
|---|---|---|
| ALLIED INTERESTS, INC., | § | IN THE DISTRICT |
| Plaintiff, | § | COURT |
| | § | |
| V. | § | TRAVISCOUNTY,TEXAS |
| | § | |
| GEORGE G. GREEN and | § | |
| GREEN CAPITAL CORP., | § | |
| Defendants. | § | 250TH JUDICIAL |
| | § | DISTRICT |

**ORDER GRANTING PLAINTIFF'S THIRD MOTION TO COMPEL DISCOVERY AND FOR SANCTIONS**

On this 12th day of July, 1997, came on to heard the Plaintiff's Third Motion to Compel Discovery and for Sanctions against Defendant George G. Green for his failure to make discovery and his violation of prior discovery orders entered by this Court. Plaintiff appeared by and through its attorney of record. Defendant George G. Green, despite being provided reasonable notice under the Texas Rules of Civil Procedure, failed to appear. The Court, having considered the Motion, the pleadings and documents on file, the evidence and the arguments of counsel, finds that the Motion is well taken, legally sufficient and should be GRANTED.

The Court makes the following findings of fact which support the entry of this Order:

(a) that on February 20, 1997, a Final Judgment was entered in this cause in favor of Plaintiff and against Defendants, jointly and severally, in the amount of $626,843.53;

(b) that all post-judgment motions relating to the Final Judgment filed by Defendants have been denied;

(c) that Defendants have not filed a supersedeas bond to suspend enforcement of the Final Judgment;

(d) that on February 20, 1997, Plaintiff filed and properly served upon Defendant George G. Green Plaintiff's First Set of Interrogatories and Request for Production of Documents in Aid of Judgment and Plaintiff's Second Set of Interrogatories in Aid of Judgment (the "Discovery Requests");

(e) that on March 3, 1997, Plaintiff properly served upon Defendants a deposition notice with subpoena duces tecum for the deposition of George G. Green individually and as an officer of Green Capital Corp. (the "Deposition Notice"), which required Defendant George C. Green to appear for his deposition and to produce the documents requested in the Deposition Notice on March 25, 1997, at the offices of Plaintiff's counsel;

(f) that on March 21, 1997, Defendants' counsel filed a Motion to Withdraw as counsel for Defendants and that Defendant George G. Green signed the Motion to Withdraw individually and as an officer of Green Capital Corp.; that the Motion to Withdraw included therein a last known address for Defendants, to wit: 4602 McCormick Mountain Trail, Austin, Texas 78734; that the Motion to Withdraw represented that Defendants were aware of the Deposition Notice and the Discovery Requests;

(g) that pursuant to Rule 201(3) of the Texas Rules of Civil Procedure, the service upon Defendants of the Deposition Notice had the same force and effect as a subpoena duces tecum;

(h) that on March 24, 1997, (the date answers were due from Defendant George G. Green to the Discovery Requests), Defendant George G. Green failed to provide answers or produce documents as required under the Texas Rules of Civil Procedure;

(i) that on March 25, 1997, (the date Defendant George G. Green was to appear for his deposition pursuant to the Deposition Notice), he failed to appear for his deposition;

(j) that on March 25, 1997, Plaintiff filed and properly served upon Defendants Plaintiff's Motion to Compel Discovery and for Sanctions relating to Defendants' failure to answer and produce documents pursuant to the Discovery Requests; that such motion contained a notice of hearing setting a hearing for such motion for April 14, 1997;

(k) that on March 15, 1997, Plaintiff filed and properly served upon Defendants Plaintiff's Motion to Compel Appearance at Deposition and for Sanctions relating to Defendant George G. Green's failure to appear for his deposition pursuant to the Deposition Notice; which motion as also set for hearing April 14, 1997;

(l) that on April 1, 1997, Defendants' counsel's motion to withdraw was granted; and that pursuant to the Motion to Withdraw and the Texas Rules of Procedure, notice of hearings and service of court papers upon Defendants by Plaintiff was legally sufficient upon Plaintiff's placing such papers in the U.S. Mail, certified mail, return receipt requested, to the last known address of Defendants as provided by Defendants in the Motion to Withdraw;

(m) that Defendants received reasonable and sufficient notice of the hearings set for April 14, 1997 on the Motions to Compel filed by

Plaintiff; that despite such notice, Defendants failed to appear at the hearings on April 14, 1997;

(n) that on April 14, 1997, the Court entered orders granting the two Motions to Compel filed by Plaintiffs, to wit: the Order Compelling Appearance at Deposition and for Sanctions and the Order Compelling Discovery and for Sanctions, both filed on April 14, 1997 (the "Discovery Orders");

(o) that Defendants were properly served with copies of the Discovery Orders;

(p) that the Discovery Orders required, among other things, that Defendant George G. Green appear on April 21, 1997, at the offices of Plaintiff's counsel for his deposition and that Defendants provide answers and documents as requested in the Discovery Requests by April 18, 1997;

(q) that Defendants wholly failed to comply with the Discovery Orders and to this day have not complied with the Discovery Order;

(s) that on May 29, 1997, this Court ordered that Aaron L. Jackson had not properly withdrawn as counsel of record for Defendants and that Mr. Jackson was still the attorney of record for Defendants at that time;

(t) that on June 3, 1997, Plaintiff served upon Defendants the Discovery Orders by serving same upon Aaron L. Jackson as attorney for Defendants pursuant to the Court's order on May 29, 1997;

(u) that on June 27, 1997, this Court granted Aaron L. Jackson's Motion for Correction ruling that he was not the attorney of record for Defendants; that this Court on that same day entered an Order Under Rule 106 of the Texas Rules of Civil Procedure, ruling that pleadings, citations and other court papers could be served upon

Defendants by serving Aaron L. Jackson in any manner allowed by law at 2839 NW Larkspur Place, Corvallis, Oregon 97330;

(v) that on July 1, 1997, Plaintiffs served upon Defendants the Discovery Orders and related Motions by serving Aaron L. Jackson at the address indicated above, certified mail, return receipt requested;

(w) that the U.S. Post Office has provided Plaintiff with a forwarding address for Defendant George G. Green, to wit: P.O. Box 9066, Horseshoe Bay, Texas 78657-9066;

(x) that Defendants have been provided copies of the Discovery Requests and the Discovery Orders in at least the following respects: (1) by certified mail, return receipt requested to George G. Green at his last known address, 4602 McCormick Mountain Trail, Austin, Texas, 78734; (2) by certified mail, return receipt requested to the forwarding address for George G. Green provided to Plaintiff by the U.S. Post Office, P.O. Box 9066, Horseshoe Bay, Texas 78657-9066; (3) by certified mail, return receipt requested to Aaron L. Jackson pursuant to this Court's order that Aaron L. Jackson was still an attorney of record for Defendants at that time; and (4)by certified mail, return receipt requested, to Aaron L. Jackson pursuant to this Court's Order under Rule 106;

(y) that Defendants have been provided notice of their obligations under the Discovery Orders and that Defendants have had ample opportunity to comply with their obligations under the Discovery Orders and the Discovery Requests; and that despite such notice and opportunity, Defendants have failed to comply with the Discovery Orders or the Discovery Requests;

(z) that Defendants were provided with reasonable notice of the Plaintiff's Third Motion to Compel and for Sanctions and the hearing on same; that despite such notice, Defendants failed to appear at said hearing;

(aa) that Defendants' failure to comply with the Discovery Orders, Defendants's failure to comply with the Discovery Requests, and Defendants failure to appear at any of the hearings on the post-judgment discovery motions, indicates a wanton disregard for the judicial process and a conscious intention by Defendants to resist discovery and constitutes an abuse of the discovery process;

(bb) that Plaintiff attempted to hold Defendant George G. Green in contempt but that Defendant George G. Green has evaded process and caused Plaintiff to incur substantial expenses due to Defendant's abuse of the discovery process; at that Plaintiff has made reasonable attempts to obtain compliance with the Discovery Orders and Discovery Requests through other means;

(cc) that the orders and sanctions ordered by the Court herein are warranted under Rule 215 (2) and (3) of the Texas Rules of Civil Procedure; that previous sanctions and the simple award of attorney's fees have not resulted in compliance by Defendants; and that more severe sanctions are necessary to obtain compliance with the Discovery Orders and the Discovery Requests;

(dd) that this Court has authority under Rule 215 of the Texas Rules of Civil Procedure and *Braden v. Downey*, 811 S.W.2d 913 (Tex.1991) to impose monetary sanctions under the facts of this case;

(ee) that the sanctions ordered by the Court herein which are contingent upon Defendants failure to appear and make discovery as ordered herein are reasonable for the additional reason that Defendant need only appear and make discovery to avoid the sanctions; and

(ff) that the sanctions ordered by the Court herein will not have the effect of limiting Defendants' access to the Court system in that

Defendant George G. Green is the person who obtained a multi-million dollar judgment from the State of Texas and has been paid several million dollars already by the State of Texas and is a beneficiary under annuities which have a final cash payment of in excess of $4,000,000.00 in January, 1999; consequently, the Court finds that Defendants have the financial ability to comply with this order;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

(a) Defendants George G. Green and Green Capital Corp. are hereby ordered to fully and completely answer the Discovery Requests on or before 12:00 p.m. on July 21, 1997; all objections to the Discovery Requests are hereby overruled; such answers and documents shall be delivered to Plaintiff's counsel at 301 Congress Avenue, Suite 2100, Austin, Texas 78701, on or before the deadline set forth herein;

(b) Defendant George G. Green is hereby ordered to the Deposition Notice (as defined in the Third Motion to Compel Discovery and for Sanctions)at the offices of Plaintiff's counsel at 301 Congress Avenue, Suite 2100, Austin, Texas 78701, at 9:00 a.m. on July 22, 1997; to the extent the Deposition Notice requests documents not already produced by Defendants pursuant to the Discovery Requests, Defendant George G. Green shall produce such additional documents at the time of his deposition as ordered herein;

(c) Defendant George G. Green is hereby ordered to pay all costs associated with the taking of his deposition as ordered herein, including, but not limited to, the charges for the court reporter and the costs of the transcript of his deposition and copies thereof;

(d) Defendant George G. Green is hereby ordered to pay to Plaintiff the sum of $4000.00 as reasonable attorneys' fees incurred by Plaintiff previously in attempting to obtain Defendants' compliance with

post-judgment discovery; said payment shall be made by Defendant George G. Green by tendering a cashier's check in said amount made payable to Allied Interests, Inc. and delivered to Plaintiff's counsel at 301 Congress Avenue, Suite 2100, Austin, Texas 78701, on or before 12:00 p.m. July 21, 1997;

(e) Defendant George G. Green is hereby ordered to pay to Plaintiff the sum of $2,000.00 as reasonable attorneys' fees incurred by Plaintiff in bringing this motion and obtaining this order; said payment shall be made by Defendant George G. Green by tendering a check in said amount made payable to Allied Interests, Inc. and delivered to Plaintiff's counsel at 301 Congress Avenue, Suite 2100, Austin, Texas 78701 on or before 12:00 p.m. July 21, 1997;

(f) Pursuant to authority under Rule 215 of the Texas Rules of Civil Procedure, Defendant George G. Green is hereby sanctioned in the sum of $10,000.00 for his disobeyance of previous orders of this Court and for his willful obstruction of post-judgment discovery in this case; Defendant George G. Green is ordered to pay said amount to Plaintiff by tendering a cashier's check in said amount made payable to Allied Interests, Inc. and delivered to Plaintiff's counsel at 301 Congress Avenue, Suite 2100, Austin, Texas 78701, on or before 12:00 p.m. July 21, 1997;

(g) In the event Defendant George G. Green fails to pay the sums ordered to be paid herein, said sums shall bear interest at a rate of 10% per annum from the date due until paid;

(h) In the event Defendant George G. Green fails to provide full and complete answers and produce documents requested in the Discovery Requests by 12:00 p.m. July 21, 1997 as ordered herein, then it is hereby ordered that for each 24 hour period after said deadline (or any part of a 24 hour period) an additional monetary sanction is ordered against Defendant George G. Green in the amount of $1,000.00 for each such 24 hour period (or any part thereof);

(i) In the event Defendant George G. Green fails to appear for his deposition as ordered herein, he is hereby ordered to appear for his deposition at 9:00 a.m. each business day following July 22, 1997 at the offices of Plaintiff's counsel at 301 Congress Avenue, Suite 2100, Austin, Texas 78701, until he complies with this order and the Deposition Notice; it is hereby ordered that for each time Defendant George G. Green fails to appear for this deposition as ordered, an additional sanction is ordered against Defendant George G. Green in the amount of $1,000.00 for each business day he fails to appear as ordered; it is further ordered that proof of such nonappearance shall be conclusive upon the Plaintiff's obtaining a certificate of nonappearance from a certified court reporter;

(j) Plaintiff shall provide Defendant George G. Green notice of this order and such notice shall be deemed to have occurred upon depositing a copy of this order in the U.S. mail, certified mail, return receipt requested to Defendant George G. Green at the following addresses: 4602 McCormick Mountain Trail, Austin, Texas 78734; P.O. Box 9066, Horseshoe Bay, Texas 78657-9066; and c/o Aaron L. Jackson, 2839 NW Larkspur Place, Corvallis, Oregon 97330.

SIGNED THIS 11th day of July, 1997.

/s/ Joseph H. Hart
JUDGE PRESIDING